United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-[redacted]4016

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CASE NO. 75-4016

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DEE KNITTING MILLS INC.; DIPPY KNITS, INC.; AND THREE D KNITTING MILLS INC.,

Respondents.

CROSS PETITION

FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
DEE KNITTING MILLS INC.: DIPPY KNITS, INC.: AND THREE D KNITTING MILLS INC.

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AUTHORITIES CITED

CASES:

STATEMENT OF ISSUES PRESENTED

1. Section 10(e) of the Act does not bar the company from contesting the Board's Section 8(a)(1) and 8(a)(2) findings.

2. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act.

3. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(2) of the Act by unlawfully soliciting authorization cards for Local 550 and by extending recognition to that organization.

4. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(3) of the Act by discharging the committee members and button wearers because of their union activities.

5. Whether the Board properly issued a bargaining order as a remedy for the Company's unfair labor practices.

COUNTER STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board(hereinafter, the Board) pursuant to Section 10(c) of the National Labor Relations Act, as amended, for enforcement of its order and by the cross petition for review of the Board's Order by Dee Knitting Mills, Inc., Dippy Knits Inc., and Three D Knitting Mills, Inc. pursuant

to Section 10(f) of the National Labor Relations Act, as amended.

FACTS

Early in 1973, Dee Knitting Mills, Inc., Dippy Knits Inc. and Three D Knitting Mills Inc. relocated their place of business from Brooklyn, New York to 1650 New Highway, Farmingdale, New York(A.195).[1/] These three concerns were involved in the manufacture and distribution of sweaters and the fabrication of knit goods, respectively(A.3). The officers and principal owners of the three businesses were Charles DiBartolo and his brother Vincent. Bob Lipsenthal was an officer and part owner of Dippy Knits Inc.(A.4).

At the time of their relocation and for a period of months thereafter, the employees were not represented by any union (A.8). There is testimony to the effect that this was simply a matter of choice on the part of the employees(A.225). Indeed, some employees had worked for the company for many years at the Brooklyn location and were quite satisfied with the treatment they received(A.195).

By the Summer of 1973, the local unions in the area had

1/ "A" references are to the Appendix to the Brief filed by Petitioner.

become aware of the employees non-representative status. Attempts at organization were conducted by Local 231, Industrial Trade Union AFL-CIO(hereinafter referred to as Local 231) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America(hereinafter referred to as the Teamsters)(A.8). Although the employees accepted the union literature and some listened to the solicitations, the attempts at organization failed as most employees were content with their present status(T950).[2/]

Apparently unsuccessful in their attempts to dissipate the workers confidence in their employers, Local 231 threatened to set up a picket line, alleging that company unfair labor practices had been responsible for the failure of their recruitment efforts(T209). Many workers became frightened at this turn of events and a company meeting was held to help allay the employees' fears. Although both DiBartolo brothers were present, only Bob Lipsenthal spoke(T542). He advised the workers that there was no need to fear the pickets and that management would accompany them to and from their cars if that would improve their sense of security(T542). Lipsenthal made no derogatory comments against the union. There were no threats of firing, closing shop or reprisals if the employees

2/ "T" references are to those sections of the Transcript not reproduced in the Appendix.

supported a union. There were no bonuses or incentives offered for employee indifference to union efforts(T846-847).

Aware of the failure of the aforementioned unions to pierce the bond between employer and employee through conventional means, Local 107 of the International Ladies Garment Workers Union(hereinafter referred to as Local 107) embarked on their own strategy or "game plan" for becoming the bargaining representative for the employees of the companies. In order to destroy the relationship between the employers and their workers and to entice the employees into supporting their union, Local 107 began a campaign of "infiltration" and "provocation."

Since employee exposure to union representatives on a restricted basis before and after work and during lunch breaks proved insufficient to sway worker loyalties, Local 107 decided to place one of its organizers into the plant itself on a full time basis. Barbara Laufman, a union organizer for the previous two years, applied for work at Dee during that Summer. The purpose of her employment was to enhance union chances of organizing the shop(A.195). Once hired, she proceeded to preach the assets of union membership to selected employees whom she enlisted in her cause. After numerous discussions, employees Freda Tarsky, Gloria Maurice, Betty Benvenuto and Ethel Fitzpatrick were invited to meet with Mrs. Laufman and Mary Ruggiero, another union organizer, at the Bon Apetite

Restaurant on August 14.[3/] Authorization cards were signed by the employees and extra cards were given out to be distributed by them to other workers(T.635)(A178-179). This full time infiltration project by Barbara Laufman resulted in her directly or indirectly signing up most of the twenty-four employees said to represent the majority of workers in the bargaining unit.

Local 107 tactics, however, were by no means restricted to Barbara Laufman's secretive enticement efforts. The efforts of Mrs. Laufman inside the shop were duplicated by Mary Ruggiero on the outside who signed up Rosetta Lyons(T879), Antoinette Jackson(T381), Paula Limery(T341), Ella Santiago(T307) and Adeline Bonanza(T465). Where union efforts to persuade existing employees to switch loyalties fell short, Local 107 countered by sending their own members to the shop for employment. If the present constituency would not support a union then the constituency itself had to be altered. To that end Laufman and Ruggerio were responsible for obtaining jobs for certain employees(such as Adeline Bonanza, Gilda Lombardo and Angela Rosa)(T476,487,148).

Supplementing the above efforts, were the "organizational" meetings called by the union. Except for the August 27 meeting held at the union office, the employees were "wined and dined" at different restaurants on three separate occasions. The gatherings at Thompson's restaurant on September 12 and

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3/ All dates cited in this Brief refer to 1973.

September 19 were attended by many employees of the companies. At the latter two gatherings, both Mary Ruggerio and Ed Banyai, the union manager, talked of vast union benefits immediately obtainable(A60-61). Based on the aforementioned recruitment efforts, it remains questionable as to whether the employees' decision on September 19, 1973 to select Local 107 as their bargaining representatives indeed reflect their free and unconstrained choice.

The union, however, was apparently still unsure of how the employees would react if the employers demonstrated their discontent for the new arrangement. The degree of employee solidarity for the union was still questionable. Thus desirous of breaking any remaining loyalty or relationship between the two, and fearful that any election might be unfavorable, Local 107 developed a plan intended to provoke the employers into substantial unfair labor practices which would eliminate employer support and lay the groundwork for a bargaining order.

At the meeting on September 19, a committee of four employees was chosen to represent the workers and accompany Mary Ruggiero and Ed Banyai to the company's office the next morning to demand recognition(A71). Co-incidentally, that committee was made up of the four women initially solicited by Barbara Laufman in the August 14 dinner meeting. All employees were given buttons declaring their support for Local 107 and

told to wear them when they reported for work the next morning (A187).

Just before 8 A.M. on the morning of September 20, Banyai and Ruggiero met with the workers in the company's parking lot. Instead of Local 107 proceeding normally to a business meeting with the Di Bartolos', the atmosphere more closely resembled that of pre-combat strategy. The committee, Banyai and Ruggiero strode into the plant through the back door(A164). Someone shouted, "buttons on"(A117). The six individuals pushed in the door to the employers' office, without knocking (A204). They were met by the two DiBartolo brothers, Bob Lipsenthal and Sal Tramuta, a supervising foreman(A203).

Banyai announced that his union now represented the employees. His presence was not preceded by any letter, telegram or request for an appointment. The employers were unaware of Local 107's degree of involvement with its employees until that moment(A162). The DiBartolos reacted to this pre-conceived challenge. However, they were not provoked to the degree suggested or hoped for by Local 107. Vincent DiBartolo told Banyai to call for an appointment and to enter through the front door and to otherwise proceed to make his demand in a more orthodox manner(T223). This request was repeated approximately ten times before he and Mary Ruggiero left(T956). No one was fired. The committee returned to the shop however shouting that "the bosses had screwed them" and "let's get out."(A224;

(T436). Banyai motioned them out the back door(T436). Conversely, Local 107 claims that the employers, when confronted did fire the four committee women and ordered all button wearers out of the shop(A189-190). The employees regrouped outside across the street from the plant(A191).

During the afternoon while the employees began picketing the shop, Charles DiBartolo approached them. Refusing to be provoked by the challenge and confrontation orchestrated by Local 107, he asked all the employees to return to work(A73). This request was repeated in letters sent to each employee the following day(T233). Both requests were refused by the employees, presumably pursuant to union instructions(A73). That same afternoon the employers still desirous of settling their differences, asked Mary Ruggerio to set up an appointment with Ed Banyai(A157).

A meeting was held on September 21 at the union office. The DiBartolos' re-iterated their desire for the "girls" to return to work(A74). Banyai stated that the unfair labor practices would have to be resolved(A159). The employers indicated that although they didn't understand what was meant by unfair labor practices, they would co-operate and retain an attorney "to work things out."(A159). Banyai, however, having been successful in infiltrating the shop and provoking the employers into a compromising position, was intent on punishing them. He was in no apparent rush to settle the strike

and return the employees to work. When told of the company's financial problems, he stated that he didn't care about that and suggested that the shop close "if they couldn't make it" (A228). He demanded that the bosses sign an admission to unfair labor practices(A228). When asked what would happen if the employees were given back pay, he declined to answer (T670-671, 693). He mentioned nothing of contract negotiations or recognition. A second meeting on September 26 between lawyers for both sides proved equally fruitless as the union continued its apathy to talk of settlement(A161).

A determination of union representation was further complicated by other events at the shop in September and October 1973. Charles Reima, a working foreman, had been soliciting support from the employees for Local 550 of the International Union of Maintenance and Production Workers (hereinafter referred to as Local 550)(T410-420). By late October-early November he had obtained signed authorization cards from a majority of the workers. Sam DeBenedictus, head of Local 550, demanded recognition of his union by the companies(T457). Confronted with a total failure of Local 107 to discuss recognition, prove majority status or negotiate a contract, the employers recognized Local 550 as the appropriate bargaining representative of its employees(T457). This was the state of affairs between the parties when the matter came on to be heard by the Administrative Law Judge in January 1974.

Leaving aside for a moment a determination of the lawfulness of Local 107's infiltration tactics in its quest for support, the question of the reasonableness of the union conduct upon gaining that support must be considered. Their conduct demonstrates their contempt for the employer and lack of respect for any of the companies' rights. Whereas reasonableness and conciliation might have easily resulted in recognition and a contract, confrontation, provocation and punishment were the paths chosen. The stumbling blocks to a quick and amicable resolution of the problem were laid by Local 107 itself. It is within this framework of union infiltration, provocation and punishment that allegations of company violations of Sections 8(a)(1), 8(a)(2), 8(a)(3) and 8(a)(5) of the National Labor Relations Act must be considered.

POINT I

THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT ARE NOT ENTITLED TO ENFORCEMENT

A. Section 10(e) of the Act Does Not Bar From Challenge Before This Court Any of the Board's Findings of Section 8(a)(1) Violations

General Counsel alleged and the Administrative Law Judge so found that the companies were guilty of a myriad of 8(a)(1) violations. The findings were based on the testimony of some twenty-four witnesses of General Counsel. The employer objected to these findings of 8(a)(1) violations by attacking the credibility resolutions upon which they were based. Respondents' exception Number 2 states:

> "The Judge erred in wholly crediting the testimony of General Counsel's witnesses while noting and then ignoring admitted discrepancies... The finding is bottomed on a fallacious premise." (A.31)

Despite this exception, General Counsel contends that the Court of Appeals is barred from considering the resolution of these 8(a)(1) findings by the Board because no mention of specific 8(a)(1) violations was made. They ignore the fact that the language of the exception itself was directed, more importantly, to the underlying basis for the various 8(a)(1) findings; namely, the credibility resolutions.

The issue then is clear. Does the language of the exception sufficiently indicate that the companies object to the various 8(a)(1) findings. It has long been held that an

exception(of a even vague or an ambiguous nature) is considered proper if it provides notice of the substance of the exception. Burinskas v. NLRB 357 F2d 822(C.A.D.C. 1966). If the exception, no matter how imperfectly drawn, indicates the thrust and purpose of the objection, then substantial compliance with Section 10(e)[4/] of the Act is said to exist. Jackson Chair Co., Inc. 110 NLRB 651, 652(1954).

A consideration of the testimony of the twenty-four General Counsel witnesses and the critically important role which the alleged 8(a)(1) violations played in General Counsel and the charging union's case demonstrates that the thrust and substance of the exception was clearly intended to be directed at the 8(a)(1) findings and understood as such by General Counsel and the Board.[5/] Twenty of the twenty-four General Counsel witnesses were employees whose testimony centered primarily around the various 8(a)(1) violations.(To a lessor extent their testimony concerned the issue of the supervisory status of Charles Reima). General Counsel sought to prove approximately eighteen separate instances of 8(a)(1) violations and spent much time in this endeavor. These 8(a)(1) violations

4/Section 10(e):"No objection that has not been urged before the Board in a timely or proper manner shall be considered by the Court.

5/The Board, after considering this exception, affirmed all of the Judge's findings, including the 8(a)(1) findings. (A33-footnote 1)

were, to a large extent, the basis for the unfair labor practice charges and the request for a bargaining order. With such an inordinate amount of attention forcused on the 8(a)(1) violations and with twenty of General Counsel's witnesses utilizing the bulk of their testimony to describe such instances, it cannot be realistically argued that Petitioner did not except to these 8(a)(1) findings through the language of exception Number 2.

The companies, rather than listing each of the myriad of 8(a)(1) findings and the testimony supporting it separately simply chose to indicate their dissatisfaction with such findings by excepting generally to the credibility resolutions upon which they were based. The nature of the case itself and the bulk of the testimony regarding 8(a)(1) violations clarify that the exception is capable of no other reasonable interpretation.

Accordingly, Petitioner asserts that the import of this exception, although framed in language of credibility, properly and sufficiently provides substantive notice that the employer objects to the various 8(a)(1) findings of the Administrative Law Judge. As such, they fall properly under the scope of review of the United States Court of Appeals.

B. Substantial Evidence on the Record as a Whole Does Not Support the Board's Findings That the Company Violated Section 8(a)(1) of the Act Through a Myriad of Acts of Interference, Restraint and Coercion.

As enunciated in the companies' exception Number 2, the

various findings of 8(a)(1) violations were based on the credibility resolutions by the Judge of the testimony of the twenty-four witnesses presented. However it is well settled that the Court of Appeals may decline to follow the action of the examiner in crediting and discrediting testimony even though the Board may have adopted the examiner's findings. In point of fact the Court is not barred from setting aside the Board's decision if it cannot conscienciously find that the evidence supporting it is substantial. NLRB. v. Monroe Automobile Equipment Co. 392 F2d 559(CA 5 1968); Portable Electric Tools Inc. v. NLRB. 309 F2d 423 (CA 7 1962).

The critical test in determining whether to set aside the Board's findings is whether such findings can be supported by substantial evidence present in the record as a whole. Universal Camera Corp. v. NLRB. 340 US 474(1950). Justice Frankfurter, interpreting the "substantial evidence test", opined:

> "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...Accordingly, it must do more than create a suspicion of the existence of the fact to be established..." Id. at page 477

In reaffirming the Court's right to set aside the Board's findings, he further stated:

> " a reviewing court is not barred from setting aside a Board's decision when it cannot conscientiously find that the evidence supporting that decision is substantial, <u>when</u>

> viewed in the light that the record in its entirety furnishes including the body of evidence opposed to the Board's view..." (Emphasis supplied) Id. at page 488-490.

It is within this frame of reference and approach to the evaluation of the witnesses' testimony that an inquiry into the 8(a)(1) findings of the Board must be conducted.

General Counsel alleged and the Board found that the employer had ripped up union literature, offered to get the employees their own union, interrogated employees and attempted to intimidate Ed Banyai by threatening violence by calling in outside people(A8-9). The evidence however on these subjects is sparse, inconsistent and oftimes offset by another body of evidence which disputes it.

With respect to the charge of ripping literature, none of the twenty-one of the twenty-two employees who testified could corroborate Betty Benvenuto's testimony. Indeed Doris Tramont testified that there was no denigration of the union(T542). Barbara Laufman stated that rather then ripping the literature, the employers asked to see it(T714). Regarding the charge of a"sweetheart union", Gloria Maurice, one of the committee women, contradicted this charge when she testified that no such offer was made by the employer(T65-1 to 25).

Charges of interrogation were also denied by the employer. The record itself discloses only that Elvira Romano was asked, at the time of her initial job interview, whether she belonged to a union(T288). Paula Limery was also asked if she ever belonged to a union. The employer then related his negative

viewpoint. However it is well settled that the mere display of anti-union hostility during the course of an organizational campaign is to be expected and not to be regarded as an unfair labor practice. Fort Smith Broadcasting Co. v. NLRB. 341 F2d 874(CA Ark. 1965). The supposed threat upon Ed Banyai was denied by Bob Lipsenthal.

There are also a variety of 8(a)(1) findings which stem from the alleged conduct of Charles Reima during the picketing. He is accused of threatening Barbara Laufman, stealing a picket and turning on a sprinkler system. All three charges involve a credibility resolution between the testimony of Reima and Laufman. Whereas Laufman's testimony is inconsistent in parts and her motivation in making the charges is obvious, the motivation of Reima to engage in such practices must remain a mystery. More importantly, assuming Reima was a supervisor, an employer cannot be held responsible for a supervisor's actions unless there is some connection between him and management, either by way of instigation, direction, approval, or acquiencence. Boyles Famous Corn Beef Co. v. NLRB.400 F2d 154(CA Mo. 1968); NLRB. v. Dayton Motels Inc. 474 F2d 328(CA 6 1973). The record is void of any evidence that management either directed such conduct or was even aware of it(assuming such conduct did occur).

Findings of 8(a)(1) violations were also based on charges of employer threats, reprisals and projected shop closings. Such threats were not only denied by management but by General

Counsel's own witnesses.[6/] Furthermore it is settled that such talk of shop closings is not violative of Section 8(a)(1) if it represents a realistic appraisal of the company's financial fortunes. Metal Processors Union Local No. 16 AFL-CIO v. NLRB. 337 F2d 114(CAUC 1964); NLRB. v. Morris Fishman & Sons 278 F2d 792(CA 3 1960).

Finally Section 8(a)(1) findings are premised on two isolated incidents: one involving the striking of Rosetta Lyons by a car driven by Salvatore DiBartolo and the other an anti-union discussion between the employer and Ella Santiago. Regarding the former, the record reflects that Salvatore DiBartolo was in no way associated with Dee Knitting Mills either as a worker or part of management. Accordingly the basis upon which his conduct may be attributed to the companies is suspect. Although his fraternal relationship may provide some suspicion, it clearly falls far short of the substantial evidence test. Further, there is no evidence that the unintended accident in any way chilled or interfered with the employees' exercise of their rights. Insofar as the anti-union comments allegedly directed at Ella Santiago, they should be dismissed as the normal company hostility attendant with an organizational drive. Fort Smith Broadcasting Co. v. NLRB, supra.

In essence, the companies assert that the credibility resolutions upon which the various 8(a)(1) findings are premised

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6/ See the testimony of Gloria Maurice, Ethel Fitzgerald, Doris Tramont T. 65;T100-104;T542)

are not supported by substantial evidence present in the record as a whole. Rather, the inconsistencies, contradictions and disputes within the testimony together with the applicable law regarding employer conduct and responsibility reflect that the myraid of 8(a)(1) violations do not exist.

POINT II

THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(2) OF THE ACT ARE NOT ENTITLED TO ENFORCEMENT

A. Section 10(e) of the Act Does Not Bar From Challenge Before This Court the Board's Findings of Section 8(a)(2) Violations.

The thrust and substance of Petitioner's argument that Section 10(e) of the Act does not bar Court of Appeals consideration of the Board's findings of 8(a)(2) violations is based on the same authorities and legal theories developed in Point IA of the Brief. Accordingly, Petitioner incorporates that argument herein by reference.

General Counsel asserts that company exception Number 2 cannot be interpreted to include the employers' objection to the 8(a)(2) findings. Such a contention lacks merit. Although the language of the exception does not make specific reference to the 8(a)(2) findings, it does object to the credibility resolutions upon which it is based. Whether the employer may be said to have violated Section 8(a)(2) of the Act depends on a determination of the employment status of Charles Reima(the employee who solicited on behalf of Local 550). Roughly one-third of the testimony of the twenty-four General Counsel employee witnesses concerned the daily duties of Reima.[7/] It was these credibility resolutions regarding Reima's duties and

7/ This was done in order to determine if he was a supervising or working foreman.

responsibilities which the Company excepted to. Thus since it is obvious that the credibility resolutions objected to, referred to 8(a)(2) (as well as 8(a)(1)) violations, it cannot be argued that General Counsel had no notice of the real import of exception Number 2. Accordingly, substantial compliance with Section 10(e) of the Act exists.

B. Substantial Evidence on the Record as a Whole Does Not Support the Board's Finding that the Company violated Section 8(a)(2) of the Act By Unlawfully Soliciting Authorization Cards for Local 550 and by Extending Recognition to that Organization.

In September and October 1973 foreman Charles Reima solicited authorization cards from the Company employees on behalf of Local 550. Whether such solicitation may be attributed to the employer and an 8(a)(2) violation found depends on his employment status. If the duties and responsibilities of his job were of a supervisory nature within the meaning of the Act then he must be considered part of management. NLRB. v. Boyer Bros. 448 F2d 555(CA 3 1971). Conversely, if the facts more properly demonstrate that he is a working foreman, his union solicitation cannot be imputed to the employer and no 8(a)(2) violation can be found. Sweatmasters Co. 176 NLRB. 301.

Section 152(11) of the Act sets forth the definition for the term 'supervisor":

> "...any individual having authority... to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward or discipline other employees or responsibility

> to direct them or to adjust their grievances... if, in connection with the foregoing, the exercise of such authority is not of a routine nature but requires use of independent judgment."

Another factor to be considered is whether the employee can be considered part of the management team. Nitro Supermarket Inc. 161 NLRB. 505.

An analysis of the record casts grave doubts on the Board's finding that Reima was such a supervisor. Maurice, Fitzpatrick, Spezia, Pastore, Romano and other employees testified that Reima neither hired nor fired anyone(T39,95,133,193,297). Furthermore, Maurice and Benvenuto contradicted Fitzpatrick and Santiago when the former two testified that the DiBartolos' never advised the workers that Reima was a supervisor(T39,206). Although there is some testimony that he doled out work, [8] the uncontradicted testimony that he was unfamiliar with the specifics of the girls' work leads to the conclusion that this duty was of a routine ministerial nature. How could he exercise independent judgment if he was unfamiliar with the girls' method for performing their jobs? This is further supported by testimony of Maurice and others who stated that he did not order them and indeed could not order them because of the aforementioned experience limitations(T59).

Reima himself testified that if he needed more employees

8/ (T287,305)

or wanted to switch the girls' assignments or wanted to give out overtime, approval of the DiBartolos was needed. He himself was paid for overtime work. Not only couldn't he hire or fire but wage increases, promotions and layoffs were also beyond his province(T401-407). Finally, the voluminous record is void of any proof that he was regarded in the same vein as Bob Lipsenthal or Sal Tramuta. He was clearly not part of the "management team."

In order to sustain the finding of a Section 8(a)(2) violation, the Board decision must be supported by substantial evidence present in the record as a whole, considering the body of proofs opposed to the Board decision as well. Given the strong corroborated and consistent testimony of Reima and the detailed testimony of many employees who found Reima to lack the supervisory accouterments demanded by the Act, the record would appear to be sufficiently lacking in proof to justify the Section 8(a)(2) finding of the Board.

POINT III

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING 19 EMPLOYEES FOR UNION ACTIVITIES AND THAT THE STRIKE WHICH ENSUED WAS AN UNFAIR LABOR PRACTICE STRIKE.

The U.S. Court of Appeals is not bound by the findings of the Administrative Law Judge even if supported by the Board. Rather, they must review the entire record in order to determine if those findings are based on substantial evidence. Universal Camera Corp. v. NLRB, supra. In evaluating the evidence on each side, the Court must determine the reasonableness of the credibility resolutions made by the Board. It need not credit the testimony of witnesses at the hearing, even if the Board does, if that testimony is unreasonable in light of the overall factual developments surrounding an incident. NLRB v. Monroe Automobile Equipment Inc. 392 F2d 559(CA Ga. 1968).

The allegations of General Counsel's witnesses that the committee and all button wearers were fired as a result of the September 20 confrontation is not borne out by and is inconsistent with the events following the supposed firings. The testimony is uncontraverted that that same afternoon Charles DiBartolo asked the girls to return to work(A73). On the following day at the meeting at union headquarters, Vincent DiBartolo repeated that no one was fired and the girls were welcome to return to work(A74). Further attempts to get the girls to return were made the following day(T233).

The employer's actions following the confrontation would seem to be totally inconsistent with any allegation of intentional job terminations. Rather, they more logically support the testimony of Charles Reima, Anne Cooper, Sal Tramuta and Bob Lipsenthal that no one was fired and that the walk out represented pre-arranged union strategy.

Any resolution of this issue however would seemingly be rendered moot by virtue of the repeated employer attempts to get the employees to return to work. Even if one assumes that the employees were fired, unconditional offers of reinstatement were made by the employer on September 2o, 21 and 22. The employer requests to return were in no way qualified. Indeed, when Charles DiBartolo asked Ed Banyai on September 21 if the employees would return on Monday if back pay was provided, he was not answered(T670-671, 693). It is settled that an unconditional offer of reinstatement made immediately after a firing eliminates any discriminatory discharge. James Hoomian D/B/A Chicago Mater Mattress and Furniture Co. And Local 365 Amalgamated Clothing Workers, 196 NLRB 579.

The failure of Ed Banyai to answer the aforementioned question really strikes at the heart of the unfair labor practice charges. It provides the key to an understanding of the real forces at work which molded the events of September 20. It was this union indifference together with the unlawful infiltration into Respondents' business and the well orchestrated provocation of Lipsenthal and the DiBartolos which resulted in the

departure of the employees.

Even if one finds that the employees were fired, such action was purposefully precipitated by the highly provacative union strategy for requesting recognition. This type of union conduct is prohibited by Section 8(b)(2) of the Act. Furthermore, the method of recruitment utilized and the decision to let the strike continue rather then bargain collectively are likewise violative of Sections 8(b)(1) and 8(b)(3) of the Act respectively. ILGW v. NLRB. 280 F2d 616(CA DC 1960); Douds v. International Long Shoremans Association Independent 147 F. Supp. 103(DC N.Y. 1957). It is settled law that an employer is not guilty of unfair labor practice charges when his 8(a)(3) actions have been provoked and caused by unlawful union conduct. NLRB. v. Electronics Equipment Co. 194 F2d 650(CA 2 1932).

Accordingly, the Company asserts that the events preceding and following the morning of September 20 were filled with union tactics of unlaw infiltration, and provocation. Any 8(a)(3) violations found to exist were caused by such conduct and were immediately followed by unconditional offerings that the employees return.

POINT IV

THE ISSUANCE OF THE BARGAINING ORDER BY THE BOARD AS A REMEDY FOR THE UNFAIR LABOR PRACTICE CHARGES AGAINST THE COMPANY WAS IMPROPER

The circumstances under which a bargaining order will be deemed appropriate were set forth by the U.S. Supreme Court in NLRB.v. Gissel Packing Co., Inc. 395 US 576(1969). The critical test is whether the unfair labor practice charges lodged against the company have the tendency to undermine majority strength so as to impede and preclude a fair and reliable election from occurring(Id. at page 614).

The rationale behind the rule is to insure that the employees' free and unconstrained will are protected and enforced (Id. at page 594). Presumably, the judicial desire is to protect this will from interference not only be the company but by the union as well. To that end, bargaining orders will not issue and an election not dispensed with, where the majority card status of the union may have been improperly obtained and the company unfair labor practice charges provoked. NLRB. v. World Carpets of New York 403 F2d 408(2ND 1968). A review of the facts in the case sub judice reveals that Local 107 engaged in just such a path of conduct.

Any allegation that the company does not desire to bargain with Local 107 and consequently would interfere with the election process to preclude such an eventuality is unfounded. After the initial provocative request for recognition on

September 20, 1973, the record is replete with repeated efforts by the company to get the union to bargain. Fitzgerald, Benvenuto, Ruggerio, Banyai and Lipsenthal all testified that on September 21 the employer requested all employees to return to work,[9/] asked for an explanation of unfair labor practices, promised to get a lawyer and displayed a desire to bargain collectively so as to obtain as speedy a return to normal as possible(A73,74,90,157-159). Indeed even the Board held that the employer was not guilty of any 8(a)(5) violation(A36).

The thrust of General Counsel's argument that the 8(a)(1) and (3) violations amply demonstrate that the employer would tamper with any election process is also without merit. Aside from the company's denial of responsibility for such violations, the record reveals that much of the alleged antagonistic conduct was nothing more than an expression of employer fears and concerns devoid of threats and reprisals. Clearly, an employer's free speech right to communicate his views to his employees is firmly established. NLRB v. Gissel Packing Co., supra, pages 617-618.

Furthermore, any charge of company unfair labor practices must be viewed in the context of improper union tactics of provocation and punishment. If the employees were fired on

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9/ This request was made on September 20 and through the mail as well.

September 20, it was only as a result of the "combat" strategy of the union and it was immediately followed by unconditional re-instatement. It is well settled that union provocation tactics are a valid consideration in evaluating whether company unfair labor practices are a valid inditia of employer predisposition to impede an election. NLRB.v. World Carpets of N.Y., supra, and NLRB.v. United Mineral and Chemical Corp. 391 F2d 829(CA 2 1968). If the company's actions are viewed in this light, it becomes clear that they afford no barometer of potential interference in any future election process. More importantly in evaluating the liklihood of future interference by the company, the employers total conduct, including the strong efforts at settlement made after September 20, must be considered. Sign And Pictorial Union Local 1175 v. NLRB 419 F2d 726(C.A.D.C. 1969).

Aside from the above, it must be remembered that the goal of a bargaining order is to give effect to the employees choice of a bargaining representatives. Whether Local 107 indeed represents the free and unconstrained choice of the company's employees must be considered suspect in view of the questionable recruitment campaign and provocation tactics employed. The placement of Laufman at the company plant and her actions, the loading of the company with employees of Local 107 persuasion and the "wining and dining" of employees casts grave doubt on how free and unconstrained this choice was(as represented by

the authorization cards). The decision of the union to request recognition in a provocative battleground setting and subsequent refusal to bargain, under the guise of unfair labor practice charges, despite unconditional offers of re-instatement raises the question of whether the union itself feared the results which an election would provide. Under such circumstances, it would seem that an election and not a bargaining order would more adequately protect the employees true preferences.

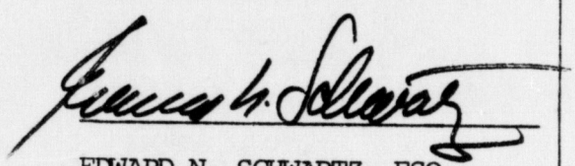
Therefore, in view of each of the aforementioned reasons as well as the considerable passage of time since the authorization cards were signed,[10] Petitioner asserts that the bargaining order was improperly issued by the Board. Where, as here, it is possible and, indeed preferable for an election to be conducted, the bargaining order should not issue. NLRB.v. World Carpets of N.Y., supra.

10/ See NLRB v. General Stencils, Inc. 472 F2d 170(CA 2 1972) where it was held that the passage of time was found to be a valid consideration in determining if a bargaining order should issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's Order should not be enforced and should be dismissed.

Respectfully submitted,



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Dated: June 20, 1975.

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NATIONAL LABOR RELATIONS BOARD, Petitioner, *vs.* DEE KNITTING MILLS, INC., DIPPY KNITS, INC., AND THREE D KNITTING MILLS INC., Respondents.	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CASE NO. 75-4016 CROSS PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD Sat Below:

CERTIFICATION

On JUNE 20 *19*75 *, I, the undersigned, being of full age did deliver to Lawyers Service or mail by regular mail for service on:*
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FEDERAL BUILDING, FOLEY SQUARE, NEW YORK, NEW YORK
and
Stephen E. Appell, National Labor Relations Board, Region 29, 16 Court Street, Brooklyn, New York, 11241 -and- John C. Truesdale, Executive Secretary, National Labor Relations Board, Washington, D.C. 20570 -and- Int'l Ladies' Garment Workers, AFL-CIO 1710 Broadway New York, N.Y.
25 *copies of* **Brief** for Respondents
to the Clerk of the U.S. Court of Appeals, Second Circuit and 3 copies of same to: Stephen Appell and John Truesdale and two copies of same to: International Ladies Garment Workers, AFL-CIO

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: June 20, 1975

Mary Sampieri
/s/ Mary Sampieri